STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 7, 2013
v LAVISE TRAVIEREEA HOOD, Defendant-Appellant.	Nos. 307575 & 315294 Saginaw Circuit Court LC No. 10-034498-FJ
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JAYLUN ANTONIO FULLER, Defendant-Appellant.	No. 308316 Saginaw Circuit Court LC No. 10-034496-FJ
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ALEXANDER ANTONIO OLIVER, Defendant-Appellant.	No. 311136 Saginaw Circuit Court LC No. 10-034508-FJ

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

In this consolidated appeal,[1] Defendants Hood (Docket Nos. 307575 & 315294) and Oliver (Docket No. 311136) appeal as of right from their convictions, following a jury trial, of armed robbery and conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a, carjacking and conspiracy to commit carjacking, MCL 750.529a; MCL 750.157a, assault with a dangerous weapon (felonious assault), MCL 750.82, and home invasion, MCL 750.110a. Hood was also convicted of resisting and obstructing a police officer, MCL 750.81d.

Hood was sentenced to serve 135 months to 20 years in prison for his convictions for armed robbery, carjacking, home invasion, and conspiracy. Hood was further sentenced to serve two to four years for felonious assault, and 13 months to two years for resisting and obstructing a police officer. All sentences were to run concurrently, and with credit for time served. On remand from this Court,[2] Hood was resentenced to serve 120 months to 20 years for armed robbery, carjacking, home invasion, and conspiracy, with credit for time served.

Defendant Oliver was sentenced to serve 135 months to 20 years for his convictions for armed robbery, carjacking, home invasion, and conspiracy. He was also sentenced to 13 months to four years for felonious assault. All sentences are to run concurrently. He was given credit for time served. Oliver also was resentenced on remand from this Court[3] to serve 120 months to 20 years for armed robbery, carjacking, home invasion, and conspiracy, with credit for time served. The trial court noted that Oliver's sentence for felonious assault had already been served.

Defendant Fuller (Docket No. 308316) appeals his conviction following a bench trial of armed robbery, carjacking, home invasion and conspiracy, felonious assault, fleeing and eluding a police officer, MCL 750.479a, and resisting or obstructing a police officer. Fuller was sentenced to serve 135 months to 20 years on his convictions for armed robbery, carjacking, and conspiracy. He also received two to four years for felonious assault, 10 to 20 years for home invasion, 2.5 to five years for fleeing and eluding, and one to two years for resisting a police officer. All sentences were to run concurrently, and with credit for time served.

All defendants were also acquitted of felony-firearm charges related to the various felonies for which they were convicted.

With regard to defendants Hood and Oliver, we affirm. With regard to defendant Fuller, we affirm his convictions but remand for resentencing.

I. BACKGROUND FACTS

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[1] *People v Hood*, unpublished order of the Court of Appeals, entered March 28, 2013 (Docket No. 315294).

[2] *People v Hood*, unpublished order of the Court of Appeals, entered September 19, 2012 (Docket No. 307575).

[3] *People v Oliver*, unpublished order of the Court of Appeals, entered November 27, 2012 (Docket No. 311136).

Defendants were arrested following a traffic stop on May 18, 2010. The vehicle occupied by defendants had been reported stolen by its owners, and witnesses reported that an occupant of the vehicle had been waving a gun out the window. A police officer testified that defendant Fuller was the driver of the vehicle, while defendants Oliver and Hood were observed exiting from the rear of the vehicle. According to testimony from the responding officers, all of the occupants, including defendants, initially tried to flee the vehicle when it stopped. An Airsoft[4] pellet gun was found at the scene.

The victims testified that they had been held at gunpoint by a group of young men while another member of the group stole the victim's car keys and cell phone. Only one of the victims, the owner of the stolen vehicle, was able to identify defendants as being among the perpetrators.

II. DOCKET NO. 308316

A. SUFFICIENCY OF THE EVIDENCE

Defendant Fuller first argues that the evidence presented at his bench trial was not sufficient to convict him of carjacking on an aiding and abetting theory. We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant Fuller argues that the evidence presented at trial was not sufficient to place him at the scene of the carjacking. In rejecting the testimony of Fuller and his alibi witness that he was at the latter's home during the carjacking and became the driver of the vehicle without knowing of it, the court stated as follows:

> What's never been explained to me and where I'm looking at this or how I'm looking at it is that at the time that Sergeant Bell hears that there is a 911 call

[4] An "Airsoft" gun is designed to look like a real firearm, but fires plastic pellets rather than fixed ammunition. See *People v Hardy*, 494 Mich 430, 437 n 7; 835 NW2d 340 (2013).

> about a carjacking, that he almost, at the same time, observes this black Trail Blazer [sic] and he continues to observe it up to the time that the occupants bail out, which includes the defendant.
>
> There was no stopping. There was no switching of drivers. He observed that Trail Blazer from the time he got the 911 call to the time that they bailed out and the defendant, along with the others, were [sic] placed into custody. . . . So based on Sergeant Bell's testimony, I believe that removes any and all reasonable doubt that the defendant was involved in the carjacking.

It is reasonable to conclude from the evidence that there was a lapse of merely three to four minutes between the first call from a witness reporting that the vehicle was at a location where Fuller claims to have entered it, and a police officer's reporting that he had spotted the vehicle several blocks away. Fuller also testified that he switched places with the driver of the vehicle after they had driven several blocks. Viewing this evidence in the light most favorable to the prosecution, and deferring to the factfinder's superior position to assess witness credibility, a rational trier of fact could have found beyond a reasonable doubt that defendant was at the scene of the carjacking. *Reese*, 491 Mich at 139. We therefore find that the evidence offered at trial was sufficient to support Fuller's convictions.

Similarly, we reject Fuller's argument that the trial court's verdict was against the great weight of the evidence. A verdict is against the great weight of the evidence when the evidence preponderates so heavily against the verdict that to allow it to stand would be a miscarriage of justice. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Here, although Fuller argues that the trial court erred in relying upon the testimony of Sergeant Bell in determining that defendant was involved in the carjacking, this Court's review of the entire body of proofs in this case does not support his claim. As stated above, the evidence indicated a span of only a few minutes elapsed between the carjacking and Sergeant Bell's pursuit of the vehicle, and that the trial court could reasonably conclude that Fuller was present during the carjacking, armed robbery, and home invasion. The trial court's verdict was not against the great weight of the evidence.

B. SENTENCING

Fuller also argues that the trial court incorrectly scored prior record variables (PRVs) 3 and 5 and offense variables (OVs) 2, 4, 10, and 12. He also asserts that he was denied the effective assistance of trial counsel because counsel failed to raise these alleged sentencing errors below. Fuller did not object before the lower court to the PRVs or OVs to which he now objects on appeal. However, Fuller raised a challenge to the scoring of OVs 2, 4, 10, and 12 in his motion to remand, which was denied by this Court,[5] thus preserving these challenges, MCL 769.34(10). Fuller's challenge to the scoring of PRVs 3 and 5 is raised for the first time on appeal.

[5] *People v Fuller*, unpublished order of the Court of Appeals, entered October 19, 2012 (Docket No. 308316).

With regard to the preserved sentencing challenges, we review for clear error a trial court's factual determinations to determine if they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts are sufficient to satisfy the scoring conditions prescribed by a statute. *Id*. To the extent that a scoring issue calls for statutory interpretation, the review is de novo. *Id*. Fuller's unpreserved argument that PRVs 3 and 5 were incorrectly scored is reviewed for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002).

Fuller did not request a new trial or evidentiary hearing based on the ineffective assistance of counsel; thus, our review of that issue is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id*.

1. PRIOR RECORD VARIABLES

Fuller first argues that the trial court improperly scored PRV 3 (prior high priority juvenile adjudications), MCL 777.53, at 10 points. Ten points are scored on this variable where the defendant has one prior high severity juvenile adjudication. MCL 777.53(1)(c). Fuller argues that this score was not appropriate because his previous high severity juvenile adjudication occurred when he was nine years old, and because of his age he "was given a diversionary type sentence of being made a ward of the court." MCL 777.50(4)(c) provides: "'Juvenile adjudication' includes an adjudication [that has been] set aside . . . or expunged." In addition, the statute further provides that for purposes of

> scoring prior record variables 1 to 5, [a sentencing court should] . . . not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication. [MCL 777.50(1).]

The adjudication in issue occurred approximately 5 years before the current offense.

This Court has held that when a juvenile adjudication occurred without the aid of legal counsel, that adjudication is not to be used in scoring the sentencing guidelines for a subsequent offense. *People v Alexander*, 207 Mich App 227, 229-230; 523 NW2d 653 (1994), citing *People* v *Carpentier*, 446 Mich 19, 521 NW2d 195 (1994). However, Fuller has not suggested that he did not have legal counsel in the prior case. Fuller's reliance on *US v Cruz-Santana*, unpublished opinion of the United States Sixth Circuit Court of Appeals, decided September 10, 1998 (Docket No. 97-5426), is misplaced. In addition to not being binding on this Court, see *People v Turner*, 390 Mich 7, 19; 210 NW2d 336 (1973), *Cruz-Santana* involved the application of

federal sentencing guidelines, not Michigan sentencing guidelines. Additionally, rather than being "diversionary"[6] as Fuller claims, the PSIR indicates that Fuller pleaded guilty to his juvenile offenses and was sentenced within the authority and the jurisdiction of the Family Division of the Saginaw County Circuit Court. See MCL 712A.2(a); MCL 712A.18(1). PRV 3 was properly scored. Fuller's claim that he is entitled to resentencing on PRV 5 (prior misdemeanor convictions or juvenile adjudications), MCL 777.55, because the trial court improperly included an offense that he committed when he was 13 years old, lacks merit for the same reason.

2. OFFENSE VARIABLES

Fuller argues next that OV 2 (lethal potential of the weapon possessed or used), MCL 777.32, was incorrectly scored at 5 points. He argues it should be scored at 1 (one) point.[7] Five points should be scored on OV 2 where "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(d). Fuller correctly notes that the only weapon found at the scene was an "Airsoft" pellet gun. Further, the trial court, in response to Fuller's motion, held that the Airsoft gun could not be used to support felony-firearm charges.

The prosecution advanced the theory that there was a second pistol used in the carjacking, based on testimony about the presence of a black pistol being used during the carjacking and being displayed from the vehicle. However, this alleged weapon was never found, and none of the victims or witnesses testified that they saw two weapons. Moreover, the court later found defendant not guilty of felony-firearm charges related to the "black gun" because there was "no credible evidence to indicate that the defendant had in his possession or was assisting someone else in the possession of a firearm." Based on the record, and specifically on the findings of the circuit court, defendant should not have been scored five points on OV 2. Because there was no testimony or other evidence presented about the lethality of the Airsoft gun,[8] this variable should be scored at zero. MCL 777.32(e), (f). This conclusion is further supported by the fact that on resentencing, the trial court scored both Hood and Oliver at zero points for OV 2. MCL 777.32(2) provides that all offenders in a multiple offender situation shall be assessed the same number of points under this variable.

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[6] A "diversionary" sentence is defined by the Federal Sentencing Guidelines as "Diversion from the judicial process without a finding of guilt." See United States Sentencing Guidelines § 4A1.2(f). Fuller does not explain why this Court should adopt this definition or offer any authority for its adoption.

[7] It appears that Fuller concedes that he "possessed or used any other potentially lethal weapon" such that OV 2 should be scored at one point. See MCL 777.32(1)(e). However, no evidence on the record supports the conclusion that the Airsoft gun possessed any potential lethality.

[8] An Airsoft gun is not a "firearm" as defined in our statutes. See MCL 8.3t; see also *People v Gee*, 97 Mich App 422, 424; 296 NW2d 52 (1980). At the risk of belaboring the obvious, a plastic pellet gun is also not a "knife or other cutting or stabbing weapon."

Fuller also claims that OV 4 was improperly scored at 10 points for serious psychological injury to a victim. MCL 777.34(1)(a). Under the statute, scoring 10 points is appropriate where "the serious psychological injury may require professional treatment," although whether treatment has actually been sought by the victim(s) is not conclusive. MCL 777.34(2). Fuller claims that the only victim who testified at his trial did not testify as to any psychological injury as a result of the offense, nor did either victim provide victim impact statements. However, one of the victims testified that she was scared when one of her assailants pointed a gun in her face and hit her with it. Another witness testified that the victim was crying immediately after the incident. "Evidence that a victim was 'fearful during the encounter with [the] defendant' [is] sufficient to support" a score of 10 points for OV 4. Although a victim impact statement was not submitted at sentencing, the record contains evidence to support this score. *Hornsby*, 251 Mich App at 468.[9]

The sentencing court scored OV 10 (exploitation of a vulnerable victim), MCL 777.40, at 10 points. This score is appropriate where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). Fuller argues that "[t]he only factor in this scoring that could possibly apply would be the alleged victims' agedness," and notes that the victims were 53 years old and 60 years old at the time of the offense.

The statute provides that the mere existence of age, physical infirmity, or any of the other factors delineated in the statute "does not automatically equate with victim vulnerability." MCL 777.40(2). The record lacks any other evidence in support of the victim's vulnerability. OV 10 should be scored at zero points, as indeed it was for both Hood and Oliver.

Finally, Fuller argues that the sentencing court improperly scored OV 12 (contemporaneous felonious criminal acts), MCL 777.42, at 10 points. Ten points are appropriate where "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed" or where "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed." MCL 777.42(1)(b), (c). The statute defines a felonious criminal act as contemporaneous where the act occurred within 24 hours of the offense, and it has not and will not result in a separate conviction. MCL 777.42(2)(a). Hood's score on OV 12 has been corrected to zero points following his resentencing hearing. Further the prosecution agrees that OV 12 was improperly scored in this case, as no contemporaneous

[9] Defendant Fuller was sentenced by a different trial judge than his co-defendants. This Court notes that Hood and Oliver's trial judge, on resentencing, overruled defendant Hood's objection and scored 10 points for this OV after hearing evidence that the victim was frightened and crying after the offense. However, the same judge also granted Oliver's objection to the scoring of OV 4 without discussion. The record appears to support a score of 10 points for Oliver on OV 4 as well. However, the prosecution did not challenge the scoring of OV 4 below and that issue is not before this Court on appeal. Further, OV 4, unlike, for example, OV 2, does not require that multiple offenders receive the same score.

felonious criminal acts occurred that did not result in separate convictions. See MCL 77.42(2)(a)(ii). Fuller's score on this variable should be zero points.

Correcting the guidelines scores results in a minimum sentence range of 126 to 219 months. MCL 777.62. Although Fuller's sentence is within the corrected guidelines, Fuller is entitled to resentencing because it is uncertain whether the court would have sentenced defendant as it did under the correct scoring of the guidelines. See *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). This is especially true here, where the trial court sentenced Fuller to the lowest minimum sentence allowed by the guidelines as originally scored; it is thus possible that the trial court would have imposed a lower sentence if the guidelines had allowed it to do so.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

Because Fuller's challenge to the guidelines scoring is being credited with regards to OVs 2, 10, and 12, he is receiving the relief he requests under his ineffective assistance challenge; we therefore need not address his argument that his trial counsel was ineffective for failing to object to the scoring of these variables. As for OV 4, this variable was properly scored; defense counsel is not required to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). We therefore decline to grant Fuller resentencing on the grounds of ineffective assistance of counsel.

II. DOCKET NO. 311136

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Oliver first argues that trial counsel provided ineffective assistance by failing to object to testimony by a retired Saginaw Police Department Officer that one of the victims, who testified at trial that she did not remember Oliver "doing anything" during the incident, identified Oliver as the perpetrator who held a gun to her head and forced her to the ground.

The retired officer testified that he used a photographic lineup, and the victim told him that she recognized Oliver as one of the perpetrators from his photograph. "She advised me," he testified, "that this is the subject that put the gun to her head and forced her down on the ground." Trial counsel did not object to the testimony, nor did he recall the victim to question her about it. Oliver argues that the officer's testimony regarding the victim's identification of him as holding a gun and forcing her to the ground was inadmissible hearsay, and that his counsel was ineffective for failing to object to the admission of the victim's statement to the officer.

MRE 801(d)(1)(C) provides that the prior statement of a witness is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person[.]

Here, the victim testified at trial, and defense counsel did cross-examine the victim concerning her identification of Oliver. Further, the victim's statement was clearly "one of identification" made after perceiving defendant Oliver. Oliver argues that the statement in issue is not "one of identification" because the victim had already identified Oliver as being one of the persons at the scene. The evidentiary rule does not include such qualifying language. That is, the rule does not provide that such a statement can only be considered non-hearsay if the declarant had not previously identified the individual earlier in the proceedings. The plain language of MRE 801(d)(1)(C) allows the admission of the victim's statement.

Thus, the testimony was properly admitted, and counsel cannot be faulted for failing to raise a meritless objection. *Ackerman*, 257 Mich App at 455.

II. SUFFICIENCY OF THE EVIDENCE

Next, Oliver challenges the sufficiency of the evidence against him. He does not argue that he was not at the scene of the crime, but rather that he did not actively participate in its commission. The trial court properly instructed the jury that "[a]nyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor." The court further instructed the jury that in order to convict, the prosecutor had to prove the elements of the crime as follows:

> First, that the alleged crime was actually committed, either by the defendant or someone else. It does not matter whether anyone else has been convicted of the crime.
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> Second, that before or during the crime, the defendant did something to assist in the commission of the crime.
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> Third, the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.
>
> It does not matter how much help, advice, or encouragement the defendant gave. However, you must decide whether the defendant intended to help another commit the crime, and whether his help, advice, or encouragement actually did help, advise, or encourage the crime" [See *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010).]

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Oliver argues that no evidence was offered by the prosecution to prove the second and third elements of the offense. He does not deny that he was present, but argues that his failure to prevent the crime was due to his relative youth (15 years old at the time of the offense), and that his mere presence there was not sufficient evidence to prove that he participated in the crime.

One of the victims testified that she could not identify Oliver as one of the people who held her at gunpoint because his face, like the rest of the perpetrators, was covered. And although the other victim testified that she recognized Oliver as one of the perpetrators, she also said that she did not "remember him doing anything." However, the retired Saginaw Police Department Officer testified that the latter victim identified Oliver from a photo array as "the subject that put the gun to her head and forced her to the ground." Another witness who spotted the stolen vehicle shortly after it was stolen testified that she saw a person in a bright yellow shirt in the vehicle in issue holding a gun. The retried officer testified that Oliver was wearing a top garment that had yellow on it in a photograph of him "probably taken by the sergeant or one of the patrol officers at the time of arrest." Taken in a light most favorable to the prosecution, this is enough evidence to establish that Oliver intended the commission of the crimes and provided assistance in carrying them out.

III. OFFENSE VARIABLES

Oliver also argues that the court incorrectly scored OVs 1, 2, 4, 10, 12, and 13. On remand from this Court,[10] the trial court scored OVs 1, 2, 4, 10, and 12 as requested by defendant without any challenge from plaintiff.

OV 13 (continuing pattern of criminal behavior) MCL 777.43, was scored at 25 points. Twenty-five points are appropriate where "[t]he offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang." MCL 777.43(1)(b). Twenty-five points may also be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Oliver acknowledges that there were four crimes against a person at issue in the present case. However, Oliver argues that according to the plain language of the statute, "[t]here can be no pattern in multiple convictions stemming from one transaction." The language of the statute does not limit the scoring in such a way. *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013). Indeed, the statute provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The contemporaneous felonies occurred within this window and were properly scored. *Gibbs*, 299 Mich App at 487-488.

II. DOCKET NOS. 307575 AND 315294

A. DENIGRATION OF DEFENSE COUNSEL

In Docket No. 307575, defendant Hood argues that he was denied a fair trial by the prosecution's alleged denigration of defense counsel, or alternatively that his trial counsel was ineffective for failing to object to this denigration. We disagree.

[10] See *People v Oliver*, unpublished order of the Court of Appeals, entered November 27, 2012 (Docket No. 311136).

A claim of prosecutorial misconduct is unpreserved "unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are, therefore, reviewed for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Unger*, 278 Mich App at 235 (quotation marks and citation omitted).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id*. at 64. "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial[,]" *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), and "need not confine argument to the blandest possible terms," *Dobek*, 274 Mich App at 66. However, "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

Here, Hood alleges that the following remarks made in the prosecution's rebuttal summation were misconduct:

> MR. DONKER: Thank you, Judge. You saw two classic approaches to defense closing. And both followed the same strategy and the same technique, don't pay any attention, let's look away from what the defendants did, let's victimize the victims again. And there's lots of interesting ways of doing it.
>
> Let's use the technique of Mr. Gust [Counsel for defendant Hood]. And he wants to make the time that the defendants had with the trailblazer [sic] [the victim's vehicle] as long as possible, so when it comes to time frame, Mr. Gust wants you to think let's believe the victims, because they said it happened in the afternoon, 4:00, maybe 5:00. He wants you to ignore the computer aided dispatch records. He wants you to believe what he otherwise thinks are people that are incapable of your trust or belief and wants you to believe them over the computer records. Why? Because it makes his client look better.
>
> Now, let's look at some of those facts that defense avoided talking about . . . .
>
> * * *
>
> The facts and evidence that are before you, not some supposition or speculation as the defense would like you to do, the facts are, is that, and again whatever theory you want to use, whether you accept the testimony at the prelim or here, both of these defendants were involved.

We find no error in the quoted statement. A prosecutor may argue from the facts in evidence that a defendant or another witness is not believable. *People v Cain*, 299 Mich App 27, 43; 829 NW2d 37 (2012). Further, the prosecutor's characterization of the defense's arguments as being based on supposition, speculation, or in ignorance of certain evidence admitted at trial was a proper comment on the weaknesses of Hood's theory of defense. See *People v Fyda*, 288 Mich App 446, 462; 793 NW2d 712 (2010). Further, the prosecutor's comments concerning the "dispatch records" were in response to the defense's arguments concerning the time the offense took place and the credibility of prosecution witnesses. The fact that "the prosecutor employed colorful rhetoric," *Fyda*, 288 Mich App at 462, does not make this response disproportionate. Hood has not demonstrated any error, plain or otherwise, in the above-quoted testimony.

Because we find no error in the prosecutor's statements, we do not find Hood's trial counsel ineffective for failing to object to it. *Ackerman*, 257 Mich App at 455. We therefore affirm Hood's convictions.

B. OFFENSE VARIABLES

In Docket No. 315294, defendant Hood argues that the trial court erred in scoring several offense variables. During his hearing on remand, defendant Hood argued that the court had incorrectly scored OVs 1, 2, 4, 10, 12, 13, and 16. Hood received relief from the court as to variables 1, 2, 10, 12, and 16. However, the court denied the requested relief as to OV 4, and did not issue a decision on OV 13. For the reasons set forth above in Docket No. 308316, we find no error in the trial court's scoring of OV 4. Further, for the reasons set forth in Docket No. 311136, we find that OV 13 was properly scored. We thus find no merit in Hood's challenge to his sentencing, and affirm the trial court.

With regard to Docket Nos. 311136, 307575 and 315294, we affirm.

With regard to Docket No. 308316, we affirm Fuller's convictions, but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra